

**VIRGINIA:**  
**IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH**

DANNY MEEKS, )  
CHRISTOPHER ANUSWITH, )  
DONNA BRADSHAW, )  
WILLIAM BRADSHAW, )  
MICHAEL J. BUXTON, )  
TODD CAIRNS, )  
DIANA CHAPPEL-LEWIS, )  
JUNE CHILDS, )  
ROGER CORNETT, )  
GLENN CORNETT, )  
JAMIE COSUMANO, )  
THERESA L. DANAHER, )  
REGINA R. DAVIS, )  
TYLER DeATLEY, )  
HELEN DRUMMOND, )  
LEON DRUMMOND, )  
NETTIE S. FISCHER, )  
CHARLES GREENHOOD, )  
JAMES JACKSON, )  
KATHY KNACK, )  
DOUGLAS KNACK, )  
JOHN McGLYNN, )  
JACQUELYN MENEFEE, )  
MARC POULASSE, )  
THOMAS E. PRICE, )  
DAVID RATCLIFF, )  
STEPHANIE REVELL, )  
CATHLEEN A. SWEENEY, )  
CLYDE W. TYSOR, )  
BETTY F. TYSOR, )  
WILLIAM WATTS, )  
ACCURATE MARINE )  
ENVIRONMENTAL, INC., )  
a Virginia corporation, )  
AGGREGATE TRANSPORTATION )  
CORP. dba ATCO HAULING, )  
a Virginia corporation, )  
AUDAX TRANSPORTATION, INC., )  
a Virginia corporation, )  
GILCO, INC., )  
a Virginia corporation, )  
GIVENS GROUP, INC., )  
a Virginia corporation, )

GIVENS TRANSPORTATION, )  
INC., a Virginia corporation, )  
GTL TRANSPORT CO., )  
a Virginia corporation, and )  
CITIZENS AGAINST UNFAIR TOLLS, )  
a Virginia unincorporated association, )  
 )  
Plaintiffs, )

v. )

Case No. \_\_\_\_\_

VIRGINIA DEPARTMENT OF )  
TRANSPORTATION )  
 )  
 )

**Serve:** )  
**Gregory A. Whirley** )  
**Commissioner of Transportation** )  
**1401 East Broad Street,** )  
**Annex Building 3rd Floor** )  
**Richmond, Virginia 23219** )  
 )

and )  
 )

ELIZABETH RIVER CROSSINGS )  
OPCO, LLC, a Delaware Limited Liability )  
Company, )  
 )

**Serve:** )  
**CT Corporation System** )  
**4701 Cox Road, Suite 301** )  
**Glen Allen, Virginia 23060-6802** )  
 )

Defendants. )

**COMPLAINT**

Plaintiffs, by counsel, state the following for their Complaint:

**PRELIMINARY STATEMENT**

1. This action is brought pursuant to the Virginia Declaratory Judgment Act, the Constitution of Virginia, the United States Constitution and 42 U.S.C. § 1983 to challenge the

Comprehensive Agreement<sup>1</sup> executed on December 5, 2011, between the Virginia Department of Transportation ("VDOT") and Elizabeth River Crossings Opco LLC (the "Concessionaire"), pursuant to the Public Private Transportation Act, VA. CODE §§ 56-556 *et seq.* (the "PPTA"). The Comprehensive Agreement was amended on March 12, 2012, and again on April 13, 2012, as more fully detailed hereinafter.<sup>2</sup> The PPTA delegates to responsible public entities, such as VDOT, the authority to enter into agreements with private parties to construct, operate and maintain transportation facilities and to establish, impose and collect tolls for the use of those facilities.

2. The central purpose of the Comprehensive Agreement is the construction of (a) a new Midtown Tunnel, paralleling the existing Midtown Tunnel which conveys traffic on U.S. Route 58 under the Elizabeth River between Portsmouth and Norfolk; and (b) a new highway, the MLK Extension, connecting Interstate 664 to Interstate 264. In addition, some "rehabilitation" is to be done to the existing Midtown and Downtown Tunnels connecting Portsmouth and Norfolk under the Elizabeth River. All of the foregoing activity, as well as the operation of the existing tunnel facilities, is referred to hereinafter, collectively, as "the New Project."

3. In order to provide a scheme to fund this new construction attractive enough to the Concessionaire, the Comprehensive Agreement purports to allow the Concessionaire to set tolls not only for the use of the facilities to be constructed, but also to re-impose tolls for the use of existing transportation facilities to pay for the construction of these new facilities. The construction debt of the existing tunnel facilities has long since been extinguished and,

---

<sup>1</sup> Comprehensive Agreement Relating to the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project Dates as of December 5, 2011 by and among the Virginia Department of Transportation, an Agency of the Commonwealth of Virginia and Elizabeth River Crossings Opco, LLC, (Execution Copy), available at [http://midtowntunnel.org/comprehensive\\_agreement.asp](http://midtowntunnel.org/comprehensive_agreement.asp) (last visited July 12, 2012).

<sup>2</sup> [http://midtowntunnel.org/documents/CA\\_Amendment\\_No.\\_1\\_web.pdf](http://midtowntunnel.org/documents/CA_Amendment_No._1_web.pdf) (last visited July 12, 2012); [http://midtowntunnel.org/documents/CA\\_Amendment\\_No.\\_2\\_web.pdf](http://midtowntunnel.org/documents/CA_Amendment_No._2_web.pdf) (last visited July 12, 2012).

consequently, the tolls for those facilities were removed more than two decades ago. Thus, the Comprehensive Agreement purports to allow the Concessionaire to exact money from the users of existing facilities to pay for the construction of these new, distinct facilities. The Comprehensive Agreement exploits the users of the existing, paid-off tunnel facilities in this way in part simply by declaring, without General Assembly authorization, that those facilities are a part of a newly defined "project," which includes the new facilities and the existing tunnels as a single undertaking.

4. In addition, in the Comprehensive Agreement VDOT commits to offset or refund the Concessionaire's payments of certain state and local taxes and to exempt the Concessionaire from those tax obligations, thereby reducing the revenues available to state and local governments to construct other transportation facilities. The Comprehensive Agreement also discourages the construction of transportation facilities that would compete with the New Project. Such special treatment of the Concessionaire is only a part of VDOT's overall protection of the Concessionaire that adversely affects the Plaintiffs by insulating the Concessionaire from competition, reducing sources of revenue to state and local governments, and assuring the Concessionaire's profitability so that it can operate the New Project and impose tolls for the 58-year term under the Comprehensive Agreement without a substantial threat of losing ridership to alternative, new transportation facilities.

5. This financing scheme in the Comprehensive Agreement to reimpose tolls on existing transportation facilities to pay for the new facilities is transparently not a bona fide fee-for-service, but a device to generate revenue to construct those new facilities. The Comprehensive Agreement's use of the concept of a "project" that combines existing, paid for facilities with new ones to accomplish this exaction is a gross abuse of that concept, stretching it

far beyond its meaning under Virginia law, without any express authorization by the General Assembly. This abuse of the concept of a "project" removes any principled limits on its scope, rendering it meaningless as a legal restraint on governmental agencies and the private entities with whom they wish to do business.

6. Tolls that raise revenue for the construction of other public facilities are not genuine user fees, but taxes. The imposition of taxes is a legislative power. Similarly, the "offsetting" of taxes – that is, deciding that the legal duty to pay taxes should be excused – is also a manifestation of the legislative power to tax. The General Assembly is prohibited by the Constitution of Virginia from delegating such legislative powers to any unelected entity. Accordingly, the General Assembly has not delegated, nor could it have delegated, such powers to VDOT in the PPTA. Consequently, VDOT has no authority to convey to the Concessionaire such legislative powers in the Comprehensive Agreement or in any other way.

7. The financing scheme of the Comprehensive Agreement conveying taxing powers to the Concessionaire, while effectively excusing the Concessionaire from certain taxes, is unlawful, and null and void *ab initio*. Tolls exacted by operation of this financing scheme are, accordingly, unlawful and violate the Plaintiffs' due process rights guaranteed by the Virginia and United States Constitutions.

8. The Plaintiffs are users of the existing transportation facilities from whom the Concessionaire, pursuant to the financing scheme of the Comprehensive Agreement, will illegally exact monies, as described above, in violation of their due process rights. This financing scheme is at the heart of the Comprehensive Agreement. Without these illegal provisions, the Comprehensive Agreement does not reflect a meeting of the minds of the parties

and fails for lack of consideration. As a result, the Comprehensive Agreement must be invalidated in its entirety.

#### **THE PARTIES**

10. Plaintiffs Danny Meeks, John Domanski, Melvin Marriner, Thomas E. Price, David Ratcliff, Stephanie Revell, Cathleen A. Sweeney, Theresa L. Danaher, Nettie S. Fischer, Donna Bradshaw, William Bradshaw, Michael J. Buxton, Helen Drummond, Leon Drummond, Charles Greenhood, John McGlynn, June Childs, William Watts, Roger Cornett and Glenna Cornett are residents of the City of Portsmouth and longtime users of the Downtown Tunnel. John Domanski is the President of Accurate Marine Environmental, Inc., another plaintiff in this action.

11. Plaintiffs Diana Chappel-Lewis, Donna Looney, Douglas E. Knack, Kathy B. Knack and Marc Poulasse are residents of the City of Norfolk and longtime users of one or more of the existing Elizabeth River tunnels. Kathy Knack is the President and Douglas E. Knack is the Vice President of Kathy Knack Interior Designs, Inc., which is another plaintiff in this action.

12. Plaintiffs Christopher Anuswith and Jamie Cosumano are residents of the City of Virginia Beach and longtime users of the Downtown Tunnels.

13. Plaintiffs Todd Cairns, Betty Tysor and Clyde Tysor are residents of the City of Suffolk and longtime users of the Midtown Tunnel.

14. Regina R. Davis, James Jackson and Jacquelyn Menefee are residents of the City of Chesapeake and longtime users of one or more of the existing Elizabeth River tunnels. Jacquelyn Menefee is the President and Chief Executive Officer of Aggregate Transportation Corp. dba ATCO Hauling, which is another plaintiff in this action.

15. Plaintiffs Roger Cornett, Glenna Cornett, David Ratcliff, Jamie Cosumano, Stephanie Revell and William Watts were users of the Midtown Tunnel or the Downtown Tunnels or both before tolls were removed from those facilities. Each of those plaintiffs paid the tolls imposed during that period for use of the tunnels.

16. Plaintiff Tyler DeAtley is a student at Old Dominion University who has no other reasonable access to the university than the Midtown Tunnel and has no electronic transponder, which is required of all but the exempt users of the New Project in order to avoid the surcharge for use of the New Project. He does not intend to purchase an electronic transponder.

17. Plaintiffs Thomas E. Price and Debbie Childs will be unable to obtain an electronic transponder, which is required of all but the exempt users of the New Project in order to avoid the surcharge for use of the New Project.

18. Plaintiffs Accurate Marine Environmental, Inc., Audax Transportation, Inc., Aggregate Transportation Corp. dba ATCO Hauling, GILCO, Inc., Givens Group, Inc., Givens Transportation, Inc., GTL Transport Co. and Kathy Knack Interior Designs, Inc., are Virginia corporations operating in South Hampton Roads, among other places. Of necessity, they use the existing Elizabeth River tunnels and will use the New Project in their businesses.

19. Plaintiff Citizens Against Unfair Tolls is a Virginia unincorporated association, the members of which are users of the existing Elizabeth River tunnels who intend to use the New Project in the absence of reasonable alternatives and who will be subject to the illegal exactions imposed by the Concessionaire pursuant to the Comprehensive Agreement. The membership of the Association as of the date of filing of this Complaint is set forth in an Addendum marked "Addendum A" and attached hereto.

20. Each of the plaintiffs and each of the members of Plaintiff Citizens Against Unfair Tolls have no practical alternative to the use of the New Project and will be required to pay the illegal tolls imposed for that use. They will be further affected by the provisions of the Comprehensive Agreement that are calculated to discourage the construction of transportation facilities that would compete with the New Project, as well as the provisions that will affect the setting of tolls and the amount of revenues available to state and local governments due to tax refunds, exemptions and offsets that are guaranteed to the Concessionaire by the Comprehensive Agreement.

21. The Virginia Department of Transportation is an agency of the Commonwealth of Virginia.

22. Elizabeth River Crossings Opco LLC is a Delaware limited liability company, the members of which are Skanska Infrastructure Development and Macquarie Group.

#### **JURISDICTION AND VENUE**

23. This Court has jurisdiction over this case pursuant to VA. CODE § 17.1-513.

24. Venue is proper in this forum pursuant to VA. CODE § 8.01-261(1) for the reasons that this is an action to review the decision of VDOT to execute the Comprehensive Agreement and that it is brought in the city where the Plaintiffs either reside or conduct affairs and business activities.

#### **FACTUAL BACKGROUND**

25. In 1942, the General Assembly established the Elizabeth River Tunnel District and the Elizabeth River Tunnel Commission for the purpose of constructing, operating and maintaining tunnels and bridges across the Elizabeth River connecting the cities of Portsmouth



and Norfolk. Those tunnels and bridges were to be financed with revenue bonds and repaid with toll revenues imposed on users of the project.

### **THE EXISTING FACILITIES**

26. The original Downtown Tunnel Project, which included the Berkley Bridge, was opened in 1952 to carry traffic across the Elizabeth River between Portsmouth and Norfolk.

27. The debt incurred to fund the original Downtown Tunnel Project has been paid off using toll revenues charged for the use of those facilities. Those tolls were limited and fixed by the total cost of that project.

28. The legislation authorizing construction of the Downtown Tunnel Project provided that tolling would cease for use of that facility once the debt for its construction was retired, except that tolls to cover the cost of project maintenance, repair and operation were permitted after the revenue bonds had been repaid if funds from other sources were not available for those purposes.

29. In 1956, the General Assembly authorized the Elizabeth River Commission to construct, operate and maintain another vehicular connection between Portsmouth and Norfolk and to combine the additional connection with the then-existing Downtown Tunnel for financing purposes. The General Assembly provided that "in the event of such combination the word 'project' as used in this Act shall include the existing project and such additional vehicular connection."

30. That additional connection between Portsmouth and Norfolk was the original Midtown Tunnel, which opened in 1962. It conveys traffic on U.S. Route 58 under the Elizabeth River between Portsmouth and Norfolk.

31. The debt incurred for the construction of the original Downtown/Midtown Tunnel Project, as the project was defined by the General Assembly in 1956 legislation, was repaid with tolls collected from users of the project.

32. In 1978, the original Downtown/Midtown Tunnel Project was incorporated into the federal Interstate Highway System. In the 1980s, the Federal Highway Administration provided 90 per cent of the funding for improvements to the original Downtown Tunnel Project so that those facilities could better handle Interstate 264 traffic. Those improvements included the expansion and rehabilitation of the adjoining, in-line Berkley Bridge, the construction of an additional two-lane tunnel paralleling the original Downtown Tunnel, and the rehabilitation of the original tunnel. No toll revenues were used to fund those improvements.

33. The tolls on the original Downtown/Midtown Tunnel Project were removed in the 1980s. At the time they were removed, the toll was \$0.25 one way.

#### **NEW TRANSPORTATION PROJECTS NEEDED**

34. As the region grew, it became apparent that the original Downtown/Midtown Tunnel Project was insufficient to meet the transportation needs of the Portsmouth-Norfolk region. Additional transportation projects to meet those needs were built or considered.

35. During the 1990s, VDOT considered construction of a second two-lane tunnel paralleling the existing two-lane Midtown Tunnel, together with improvements to the Hampton Boulevard/Brambleton Avenue Interchange in Norfolk and to the Pinnars Point Interchange and Connector in Portsmouth. VDOT also considered constructing the MLK Extension as a separate undertaking. A lack of funding prevented implementation of these various projects.

36. A private party other than the Concessionaire submitted a PPTA proposal to VDOT in 1999 that offered 90 per cent private funding to construct an additional two-lane tunnel

paralleling the original Midtown tunnel on the condition that VDOT would grant the proposer a long-term concession to reintroduce tolls on the original Downtown/Midtown Tunnel Project to fund construction of the additional Midtown Tunnel. That PPTA proposal was withdrawn in 2000.

37. In 2004, VDOT sought PPTA proposals to construct a new Midtown Tunnel Corridor Project, which did not include the Downtown Tunnels or a new MLK Extension. Three proposals were submitted, one of which was by Tidewater Skanska suggesting that the project definition and scope be modified to include a new MLK Extension and re-tolling of the original Downtown/Midtown Tunnel Project to make financing more attractive to investors. Nothing came of these proposals at that time.

38. In 2005, the Pinners Point Interchange Project in Portsmouth was completed at a cost of \$150 million without toll funding. The Pinners Point Interchange Project connects St. Rt. 164 (the Western Freeway) and U.S. Rt. 58 (the MLK Expressway), and it provides access to and from the Midtown Tunnel for vehicles traveling on U.S. Rt. 58 and St. Rt. 164.

#### **THE COMPREHENSIVE AGREEMENT**

39. In 2006, Hampton Roads Metropolitan Planning Organization (the "MPO") determined that construction of several projects including a new, two-lane Midtown Tunnel and the MLK Extension was financially feasible if revenue generated by imposing tolls on existing, paid-for transportation Projects was used to supplement public funding. The MPO was also concerned that existing transportation facilities, functioning at that time without tolls, would attract traffic away from the new facilities for which tolls would be charged. Consequently, the MPO proposed that tolls be reinstated for the use of the original Downtown/Midtown Tunnel Project, and, for the first time, tolls be imposed for the use of the Pinners Point Interchange

Project. The MPO rationalized this by summarily defining those distinct, existing, completed, and paid-for Projects as part of the project that was to become the subject of the Comprehensive Agreement at issue here. The definition of the “project” concocted by the MPO has never been authorized or ratified by the General Assembly

40. VDOT initiated meetings with the cities of Norfolk and Portsmouth beginning in 2006 to discuss the prospect of undertaking construction of the facilities proposed by the MPO.

41. On January 7, 2010, VDOT, Elizabeth River Crossings, LLC,<sup>3</sup> and Elizabeth River Crossings Opco, LLC entered into an interim agreement to finalize plans for a new project, to include the construction of a new Midtown Tunnel and the MLK Extension, along with rehabilitation of the original Downtown Tunnel and Midtown Tunnel Projects. The interim agreement was subsequently amended on August 19, 2011.

42. The interim agreement was terminated by written agreement<sup>4</sup> on December 5, 2011, the same day on which the Comprehensive Agreement was executed by VDOT and the Concessionaire.

43. The Comprehensive Agreement provides for the re-establishment and reimposition of tolls on vehicles using the original Downtown/Midtown Tunnel Project, which was constructed and paid for with the toll revenues paid by users of that Project before the Comprehensive Agreement was executed.

44. The Comprehensive Agreement authorizes the parties to establish and the Concessionaire to impose and collect such tolls in differing amounts, depending on the time of day.

---

<sup>3</sup> Elizabeth River Crossings, LLC, is a Delaware company that is not a party to this action and is not the operations company that executed the Comprehensive Agreement.

<sup>4</sup> Termination of Interim Agreement and Release of Guarantee (Execution Copy), *available at* [http://midtowntunnel.org/comprehensive\\_agreement.asp](http://midtowntunnel.org/comprehensive_agreement.asp) (last visited July 12, 2012).

45. The Comprehensive Agreement further authorizes the Concessionaire to require every vehicle using any of the facilities under its control, except exempt vehicles, to pay the tolls by an electronic method or pay a surcharge as well as the amount of the toll.

46. The Concessionaire relies upon the Virginia Department of Motor Vehicles (DMV) to provide license plate identification in order to assure collection of the toll and surcharge from those users who do not pay by the electronic method. If DMV charges for that service, VDOT is obligated under the Comprehensive Agreement to reimburse the Concessionaire for its payment of those charges.

47. The Comprehensive Agreement also obligates VDOT to contribute \$362 million toward the cost of the Project. The total cost is identified as \$2.1 billion. The Concessionaire will obtain a loan pursuant to the federal Transportation Infrastructure Finance and Innovation Act in the amount of \$422 million and will finance the remaining \$1.9 billion of the costs through equity investment, borrowing and toll revenues.

48. The Comprehensive Agreement provides that VDOT will retain ownership of the facilities involved, but will convey a lease of the facilities to the Concessionaire and issue a permit authorizing the Concessionaire for a period of 58 years to impose and collect tolls for the use of the facilities under its control.

49. The Comprehensive Agreement obligates VDOT to make payments to the Concessionaire to compensate the Concessionaire for its additional costs and loss of revenues resulting from the construction by VDOT or with funds from VDOT of a competing transportation facility.

50. The Comprehensive Agreement obligates VDOT to make payments to the Concessionaire to offset the Concessionaire's payment of certain state and local taxes during the term of the Agreement.

51. The Comprehensive Agreement authorizes the Concessionaire to realize a 13.5 per cent average annual return on investment through its 56-year term.

52. The March 21, 2012, amendment to the Comprehensive Agreement provides for deferral of the initiation of tolling on the for the newly concocted New Project until January 2014 and the payment of an additional \$100 million by the Commonwealth to the Concessionaire.

53. The commencement of tolling will require the users of the existing tunnels that have now been designated as components of the newly concocted New Project to pay for the use of facilities that were constructed and paid for long ago while new components of the New Project are being constructed and to continue paying for the cost of construction of the new components for the duration of the 58-year term of the Comprehensive Agreement.

54. The amendment to the Comprehensive Agreement that was adopted on April 13, 2012, provides for limitation on tolling at the High Street ramps at the new MLK Extension.

55. All of the allegations in this Complaint are incorporated into each of the following counts as may be required.

#### **COUNT ONE**

56. The Constitution of Virginia vests legislative power in the General Assembly. No legislative power may be delegated to a private entity. While legislative power may generally be delegated to an administrative agency of the Commonwealth of Virginia when the General Assembly enacts specific policies and fixes definite standards to circumscribe the agency in the exercise of that power, the power to exact taxes, or to determine the scope or forgiveness of

taxation, may not be delegated to any individual or entity, public or private, that is not elected.

VA. CONST., art. IV, § 1.

57. The General Assembly has the exclusive power and prerogative under the Constitution of Virginia to grant exemptions from state taxes.

58. The General Assembly is constitutionally prohibited from delegating a power to impose a tax on an unelected body. Setting tolls on existing transportation facilities to fund the costs of constructing new transportation facilities is an exercise of the power to impose taxes, and cannot be delegated to the Concessionaire. The General Assembly is constitutionally prohibited from authorizing VDOT, an agency of the Commonwealth, to enter into an agreement to pay a private party to offset the private party's payment of state taxes. Such an agreement in effect constitutes an exercise of the legislative power governing taxation, which cannot be delegated to VDOT. Such an agreement, if valid, would have the necessary effect of binding the General Assembly, circumscribing or altering its power to impose taxes at its discretion.

59. The General Assembly has plenary power to authorize the construction of transportation facilities within the Commonwealth, and to statutorily define the terms under which such facilities are constructed and financed. That power can be limited under Virginia law only by specific constitutional provision. That power may not be restricted or circumscribed by agreement between a state agency and a private party.

60. The terms of the Comprehensive Agreement are based on the unwarranted assumption that VDOT has the power:

- a. to reach an agreement with a private party that redefines a statutory term, such as a particular "project" that has previously been defined by the General Assembly for purposes of revenue financing;

- b. to fix the amount of financial exactions imposed on vehicles using facilities under the control of the private party at levels that are not directly related to the costs of the facility used;
- c. to delegate power to unelected individuals, including private parties, to establish charges for the use of a transportation facility that differ in amount depending on the time of day at the discretion of those unelected officials;
- d. to classify vehicles subject to financial exactions for use of facilities without adequate legislative standards guiding that classification;
- e. to exempt or partially exempt a private party from the obligation to pay certain state and local taxes;
- f. to provide for the refunding of payments made by the private party in the form of state and local taxes;
- g. to obligate an agency of the Commonwealth to pay a concessionaire its additional costs and loss of revenues as a result of the construction of a competing transportation facility;
- h. to authorize a concessionaire to realize an average annual return on investment of 13.5 per cent;
- i. to authorize an annual increase in the amount of tolls at a rate of 3,5 per cent;
- j. to require users of transportation facilities to pay a toll by an electronic method or pay a surcharge in addition to the amount of the toll;
- k. to restrict the discretion of the General Assembly and local governing bodies in imposing taxes and determining whether, where and when to construct or authorize construction of transportation facilities; and
- l. to delegate legislative power without adequate principles and standards to guide the exercise of that power and discretion.

61. To the extent that any provision of the PPTA purports to delegate, or may be construed as delegating, such powers to VDOT, that provision is in violation of Article IV, § 1 of the Constitution of Virginia.



## **COUNT TWO**

62. VDOT lacks the authority under the provisions of the Constitution of Virginia, the PPTA, or any other enactment of the General Assembly to enter into an agreement with a private party that redefines a term that has previously been statutorily defined by the General Assembly; that fixes the amount of financial exactions imposed on vehicles using facilities under the control of the private party which amount is not directly related to the costs of the facility used; that classifies vehicles subject to financial exactions for use of facilities; that exempts or partially exempts a private party from the obligation to pay certain state and local taxes; that provides for the refunding of payments made by the private party in the form of state and local taxes; and that mandates that every user of the facilities under the control of the private party must pay a toll by an electronic method or pay a penalty.

## **COUNT THREE**

63. The General Assembly is prohibited from enacting local, special or private laws that exempt property from taxation. VA. CONST., art. IV, § 14, cl. 7.

64. By enacting the PPTA in a way that authorizes VDOT to agree that the Concessionaire will be compensated by the Commonwealth for payments of certain state and local taxes, the General Assembly has by indirection granted the Concessionaire alone an effective exemption from those taxes.

65. The Constitution prohibits legislation that purports to accomplish indirectly what the General Assembly is prohibited from doing directly. The General Assembly may not authorize an agency of the Commonwealth to grant an exemption to a single private party through an agreement with that party when the General Assembly itself is constitutionally barred from granting such a special exemption directly.

66. Any delegation to VDOT by the PPTA of the discretion to enter agreements that provide for the refunding of money from the treasury of the Commonwealth to a private party for its payment of taxes is effectively an exemption from taxation and, therefore, a violation of Article IV, § 14, cl. 7 of the Constitution of Virginia because the General Assembly cannot authorize an agency of the Commonwealth to do what the General Assembly is prohibited from doing directly.

#### **COUNT FOUR**

67. The General Assembly is prohibited from enacting any local, special or private law that remits, releases, postpones, or diminishes any obligation or liability of any person to the Commonwealth or to any political subdivision thereof. Va. Const., art. IV, § 14, cl. 8.

68. To the extent the PPTA grants VDOT the power to enter agreements that provide for the special grant to a private party of a right to receive payment from the treasury of the Commonwealth to offset and, therefore, diminish a tax imposed on the private party by the General Assembly or the governing body of a political subdivision of the Commonwealth, it violates Article IV, § 14, cl. 8 of the Constitution of Virginia because the General Assembly cannot authorize an agency of the Commonwealth or any private entity to do what the General Assembly is prohibited from doing directly.

#### **COUNT FIVE**

69. The General Assembly is prohibited from enacting any local, special or private law refunding money lawfully paid into the treasury of the Commonwealth or the treasury of any political subdivision of the Commonwealth. VA. CONST., art. IV, § 14, cl. 9.

70. The General Assembly has the exclusive power under the Constitution of Virginia to determine the circumstances in which a refund of state taxes will be permitted.

71. An agreement to pay a private party an offset for its payment of taxes is tantamount to a refund of taxes.

72. To the extent the PPTA grants VDOT the power to enter an agreement with a private party that provides for the refunding of payments of state or local taxes made by that private party to the treasury of the Commonwealth or the treasury of a political subdivision of the Commonwealth, it is a violation of Article IV, § 14, cl. 9 of the Constitution of Virginia because the General Assembly cannot authorize an agency of the Commonwealth to do what the General Assembly itself is prohibited from doing directly.

#### **COUNT SIX**

73. The Comprehensive Agreement allows the exaction of money from users of transportation facilities that is unrelated to the benefit received by those users from those facilities and that has not been authorized by the General Assembly. In addition, the Comprehensive Agreement allows the exaction of money from users of those transportation facilities under the complete, unfettered discretion of VDOT and the Concessionaire, which arbitrary power cannot be delegated by the General Assembly. Finally, the Comprehensive Agreement allows the exaction of money from users of those transportation facilities at levels determined in part by the decrease in revenue occasioned by the tax exemption granted to the Concessionaire by the Comprehensive Agreement. Because such exactions have not been properly authorized by the General Assembly they are illegal and violate the Plaintiffs' right to due process guaranteed by Article 1, Section 11 of the Constitution of Virginia.

#### **COUNT SEVEN**

74. VDOT and the Concessionaire are persons within the meaning of 42 U.S. C. § 1983.

75. The Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when persons acting under color of state law deprive other persons of due process.

76. The exaction of monies from the Plaintiffs by the Defendants under the facts alleged herein constitutes a deprivation of Plaintiffs' property without of due process.

77. Defendants' actions as alleged herein are taken under color of Virginia law.

78. The setting, imposition and collection of tolls pursuant to the Comprehensive Agreement constitute a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because such actions are to be undertaken by individuals who have not been popularly elected and are empowered to act without adequate limits to the exercise of their discretion.

79. The PPTA fails to establish adequate principles or standards to guide VDOT in the exercise of its discretion in negotiating agreements with private parties.

80. The PPTA cannot delegate legislative power to a private entity, such as the Concessionaire.

81. The Defendants are exercising legislative power and acting beyond their lawful authority by setting and imposing tolls to generate revenue, which constitutes the act of taxing under Virginia law.

82. The provisions of the Virginia Constitution that govern the exercise of legislative power, described above, protect the interests of the State's citizens in their life, liberty, and property. Those constitutional provisions establish the foundational processes guaranteed to the State's citizens that limit and restrain the governmental power that can be used to deprive them

of their life, liberty, or property. As a result, the State's citizens have a distinct and protected interest in those constitutionally guaranteed processes.

83. According, the violations of the Virginia Constitution set out above violate the Plaintiffs' right to due process guaranteed by the Due Process Clause of the Fourteenth Amendment to the United State Constitution, as enforced by 42 U.S.C. §1983.

WHEREFORE, Plaintiffs pray for judgment from this Court that (1) the General Assembly has unlawfully delegated its legislative power in violation of Article IV, § 1 of the Constitution of Virginia; (2) the General Assembly has violated Article IV, § 14, cl. 7 of the Constitution of Virginia by authorizing a state agency to grant a special tax exemption to a private party; (3) the General Assembly has violated Article IV, § 14, cl. 8 of the Constitution of Virginia by authorizing a state agency to agree to diminish a private party's obligation to the Commonwealth and its local governments; (4) the General Assembly has violated Article IV, § 14, cl. 9 of the Constitution of Virginia by authorizing a state agency to grant a special refund of state and local taxes to a private party; (5) that the Defendant Virginia Department of Transportation lacked authority to execute the December 5, 2011, comprehensive agreement with Elizabeth River Crossings Opco LLC; and (6) that tolls, penalties and surcharges authorized by the December 5, 2011, comprehensive agreement between the Defendants violate the Due Process Clause of Article I, § 11 of the Constitution of Virginia and the Due Process Clause of the Fifth Amendment to the United States Constitution; and granting Plaintiffs their costs and attorneys' fees incurred in this action pursuant to 42 U.S.C. § 1988, and such other relief as the Court deems proper.

Respectfully Submitted,

Dated: July 12, 2012

---

**Patrick M. McSweeney (VSB # 5669)**

Attorney at law  
3358 John tree Hill Road  
Powhatan, VA 23139  
(804) 937-0895  
(877) 598-4668 (Fax)  
pmcsweeney.esq@gmail.com

**Christopher I. Kachouroff (VSB # 44216)**

**DOMINION LAW CENTER, P.C.**

13649 Office Place, Suite 101

Woodbridge, VA 22192

(703) 365-9900

(703) 365-9593 (Fax)

ck1@trialjustice.net

**Robert J. Cynkar (VSB # 23349)**

**CUNEO, GILBERT & LADUCA, LLP**

106-A South Columbus Street

Alexandria, VA 22314

(703) 350-4052

(202) 789-1813 (Fax)

rcynkar@cuneolaw.com

*Counsel for Plaintiffs*